Technology claim that, because the combined entity will be able to provide a bundled package of exchange access, long distance, and Internet access entirely on its own network, the merger will harm the goals of universal service by shifting business customers from the public switched network to MCI WorldCom's competing LEC network, thereby diverting revenues away from incumbent LECs that continue to have carrier-of-last-resort obligations and increasing pressure on the incumbent LEC to raise residential rates and reduce network investment.[632] In addition, CWA asserts that the goals of universal service are threatened by accelerating access charge bypass, thereby prematurely reducing available funds that historically have included a component which subsidizes the high costs incurred by incumbent LECs to provide a ubiquitous local network.[633]

218. Commenters' contentions do not present a public interest basis for denying the proposed merger. As a competing LEC providing both interstate and intrastate telecommunications services, the combined entity will be required to make universal service contributions based on the same contribution percentages as are applied to incumbent LECs.[634] In addition, any inequity to the incumbent LEC with state imposed carrier-of-last-resort obligations resulting from the proposed merger is minimized by the fact that, pursuant to section 214(e)(1) of the Communications Act, only common carriers that offer and advertise the availability of the core universal services throughout a state designated service area may be designated as eligible to receive federal universal service support.[635] Thus, incumbent LECs serving high cost areas, which may be the most difficult to serve without support, may apply for federal universal service support funded, in part, by private network operators.

219. Regarding CWA's second contention, that the combined entity's access charge savings will undermine universal service, we agree with Applicants that the 1996 Act, the *Universal Service Order*, and the *Access Charge Reform Order* contemplate that incumbent LECs will lose customers, and the access revenue generated by those customers, to competing

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[632] Alliance for Public Technology Jan. 26 Reply Comments at 4; CWA Jan. 5 Comments at 26-31; CWA Jan. 26 Reply Comments at 15-16; CWA Aug. 5 *Ex Parte* at 5-6.

[633] CWA Jan. 5 Comments at 26-31; CWA Jan. 26 Reply Comments at 15-16; CWA Aug. 5 *Ex Parte* at 5-6.

[634] Even assuming, as CWA contends, that MCI WorldCom would be operating a "private network," the combined entity will be required to make universal service contributions. Pursuant to section 254(d) of the Communications Act, the Commission has held that "private service providers that offer their services to others for a fee" are subject to the same universal service contribution obligations as common carrier providers of telecommunications services. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9183-84, para. 795 (1997) (subsequent history omitted) (*Universal Service Order*).

[635] 47 U.S.C. § 214(e)(1).

LECs.[636] Under the 1996 Act, however, universal service will be maintained through explicit subsidies to eligible telecommunications carriers.[637] Based on our foregoing conclusions, it is not necessary for the Commission to require the combined entity to dedicate a portion of the efficiency savings resulting from the proposed merger to supplement discounts provided to schools, libraries, and rural health care providers as part of the universal service program, as CWA suggests.[638] Moreover, we decline to condition the merger, as suggested by the Alliance for Public Technology, on the combined entity's investment in telecommunications infrastructure for underserved communities.[639]

B. Procedural Motions

220. *Motions to Dismiss.* GTE and Rainbow/PUSH filed motions urging the Commission summarily to dismiss the applications, because Applicants have failed to provide sufficient information showing that the proposed transaction is in the public interest and will not eliminate potentially significant sources of competition.[640] As our extensive analysis indicates, we find that the Applicants have presented sufficient evidence for the Commission to find that the instant merger is in the public interest. We, therefore, reject their motions to dismiss.

221. *Motions to Establish a Procedural Schedule.* To the extent that GTE, in its motion filed July 28, 1998, seeks, in addition to expedited consideration of its original motion

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[636] *See Universal Service Order,* 12 FCC Rcd at 8847-60, paras 127-149; Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982 (1997), *aff'd sub nom.Southwestern Bell Telephone Co.v FCC*, Nos. 97-2618 *et al.* (Aug. 19, 1998) (other subsequent history omitted) (*Access Charge Reform Order*).

[637] *See* 47 U.S.C. §§ 254(b)(5) & (e); WorldCom/MCI Jan. 26 Reply Comments at 24-25.

[638] CWA Aug. 5 *Ex Parte* at 5.

[639] Alliance for Public Technology Jan. 26 Reply Comments at 7. We note that the Commission has recently initiated proceedings to address issues regarding the deployment of advanced services. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (rel. Aug. 7, 1998); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998).

[640] *See* GTE Motion to Dismiss; GTE June 11 Renewed Motion (asserting that the Applicants have failed to demonstrate that the adverse competitive effects of the merger are outweighed by the tangible public interest benefits); Rainbow/PUSH May 21 Renewed Motion (contending that Applicants have failed to satisfy their burden of proof).

to establish a procedural schedule, production of MCI and C&W's divestiture agreement, we have, as explained above, requested that agreement and it has been placed in the record. We deny, however, GTE's motion to establish a procedural schedule to permit comment on the divestiture agreement.[641] We believe further pleading cycles are unnecessary, particularly in light of the permit-but-disclose *ex parte* posture of this proceeding.

222. *Petition for Reconsideration.* We deny Telstra's petition for reconsideration of the Common Carrier Bureau's (Bureau) order[642] that established an additional pleading cycle to permit parties to comment on WorldCom and MCI's reply comments.[643] Telstra asserts that another pleading cycle, beyond the one established by the Bureau's order, is necessary to allow interested parties to comment after they have inspected "all relevant documents including the HSR documents which the [Commission] obtains in due course from the DOJ."[644] Again, we find that, given the permit-but-disclose posture of this proceeding, parties have sufficient opportunity to express their views on any material that has been submitted into the record by the Applicants.

223. *Motion and Request for Immediate Review of Non-Public Materials.* We dismiss as moot Simply Internet's motion and Inner City Press' request for immediate review of all non-public materials that the Commission has in its possession.[645] All non-public information received by the Commission has been placed in the record in this proceeding and is available for inspection by interested parties under the terms and conditions of the protective order adopted in this proceeding.[646]

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[641] *See* GTE's Motion for Establishment of Procedural Schedule (filed June 17, 1998); GTE July 22 Motion.

[642] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order, DA 98-384 (rel. Com. Car. Bur. Feb. 27, 1998).

[643] Telstra Mar. 13 Comments and Petition for Reconsideration.

[644] *Id.* at 2.

[645] *See* Simply Internet's Motion for Immediate Review of Non-Public Material (filed Feb. 10, 1998); Inner City Press' Comments/Reply Request for Review of "Non-Public" Materials (filed Mar. 20, 1998).

[646] *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Order Adopting Protective Order, DA 98-1072 (rel. Com. Car. Bur. June 5, 1998).

VII. CONCLUSION

224. For all the foregoing reasons, we conclude that Applicants have carried their burden of showing that the proposed merger will serve the public interest, convenience, and necessity, if, and only if, MCI first sells it Internet business to C&W prior to the close of its merger with WorldCom. Accordingly, we hereby grant their merger application, subject to the divestiture of MCI's Internet assets. Further, we condition the transfer to WorldCom of MCI's DBS license on whatever action the Commission may take pursuant to the pending application for review of the initial license grant to MCI.

VIII. ORDERING CLAUSES

225. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the applications filed by WorldCom, Inc. (WorldCom) and MCI Communications Corp. (MCI) in the above-captioned proceeding ARE GRANTED subject to the conditions stated below.

226. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for WorldCom to acquire control of

a) any authorization issued to WorldCom's subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval;

b) construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications; and

c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.[647]

227. IT IS FURTHER ORDERED that this grant IS CONDITIONED on MCI's divestiture of its Internet assets to Cable & Wireless prior to the close of its merger with WorldCom.

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[647] *AT&T/McCaw Order*, 9 FCC Rcd at 5909 n.300.

228. IT IS FURTHER ORDERED that the transfer to WorldCom of MCI's DBS license IS CONDITIONED on whatever action the Commission may take pursuant to the pending application for review of the initial license grant to MCI.

229. IT IS FURTHER ORDERED that all references to WorldCom and MCI in this Order shall also refer to their respective officers, directors and employees, as well as to any affiliated companies, and their officers, directors and employees.

230. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that GTE's Motion to Dismiss, filed on January 5, 1998, GTE's Renewed Motion to Dismiss, filed on June 11, 1998, and Rainbow/PUSH Coalition's Renewed Motion to Dismiss, filed on May 21, 1998, ARE DENIED.

231. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that GTE's Motion for Establishment of a Procedural Schedule, filed on June 17, 1998, IS DENIED and GTE's Motion for Expedited Consideration of GTE's Motion for Establishment of a Procedural Schedule and Production of Related Materials, filed on July 22, 1998, IS DENIED IN PART AND GRANTED IN PART.

232. IT IS FURTHER ORDERED, pursuant to section 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(2), that the requests for evidentiary hearing filed by Inner City Press, Rainbow/PUSH, Simply Internet, and TMB on January 5, 1998, and the requests for evidentiary hearing filed by the Greenlining Institute and GTE on March 13, 1998, ARE DENIED.

233. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petitions to Deny filed by Bell Atlantic, GTE, Inner City Press, Rainbow/PUSH Coalition, Simply Internet, TMB, and the United Church of Christ on January 5, 1998, the Petition for Conditional Approval filed by BellSouth on January 5, 1998, and the Petition to Deny filed by the Greenlining Institute on March 13, 1998, ARE DENIED.

234. IT IS FURTHER ORDERED that Telstra's Petition for Reconsideration of the Common Carrier Bureau's order establishing an additional pleading cycle filed on March 13, 1998, IS DENIED.

235. IT IS FURTHER ORDERED that Simply Internet's Motion for Immediate Review of Non-Public Material filed on February 10, 1998, and Inner City Press' Request for Review of Non-Public Materials filed on March 20, 1998, ARE DISMISSED as MOOT.

236. IT IS FURTHER ORDERED, that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX

Comments Filed in Response to Pleading Cycles
WorldCom and MCI Merger
CC Docket No. 97-211

Petitions to Deny/Comments on Nov. 21 Amended Application -- January 5, 1998

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Bell Atlantic
BellSouth Corporation (BellSouth)
Communications Workers of America (CWA)
GTE Service Corporation (GTE)
Inner City Press/Community on the Move (Inner City Press)
Office of Communication of the United Church of Christ, Consumers Union and the National Association for Better Broadcasting (United Church of Christ)
Rainbow/PUSH Coalition (Rainbow/PUSH)
Simply Internet, Inc. (Simply Internet)
Telstra Corporation Limited (Telstra)
TMB Communications, Inc. (TMB)

Reply Comments on Nov. 21 Amended Application -- January 26, 1998

Alliance for Public Technology
Coalition of Utah Independent Internet Service Providers (CUIISP)
CWA
Consumer Project on Technology
GTE
Simply Internet
United States Internet Providers Association (subsequently withdrawn)
WorldCom and MCI

Comments on GTE's Motion to Dismiss -- January 27, 1998

CWA
Rainbow/PUSH
WorldCom and MCI

Reply Comments on GTE's Motion to Dismiss -- February 5, 1998

BellSouth
GTE
WorldCom and MCI

Petitions to Deny/Comments on WorldCom/MCI Joint Reply -- March 13, 1998

Bell Atlantic
BellSouth
The Greenlining Institute
GTE
Independent Payphone Service Providers for Consumer Choice (IPSPCC)
Rainbow/PUSH
Simply Internet
Sprint Corporation (Sprint)
Telstra
TMB

Reply Comments on WorldCom/MCI's Joint Reply -- March 20, 1998

CUIISP
CWA
Fiber Network Solutions, Inc. (Fiber Network Solutions)
David Holub
Inner City Press
Texas Internet Service Providers Association
WorldCom and MCI

Comments on MCI's June 3, 1998 Ex Parte -- June 11, 1998

AT&T
Bell Atlantic
BellSouth
CWA
GTE
Internet Service Provider's Consortium
Simply Internet
Sprint
Telstra

September 14, 1998

SEPARATE STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: Application of WorldCom, Inc. and MCI Communications Corporation For Transfer of Control of MCI Communications Corporation to WorldCom, Inc.; CC Docket No. 97-211.

I support today's decision approving the proposed merger between WorldCom, Inc. and MCI Communications Corporation. I concur in that result, but write separately to express my concern with several aspects of the underlying reasoning and to disapprove explicitly of the conditions imposed on this merger. I am also unwilling to adopt in its entirety the proposed framework for analyzing mergers presented here as I believe that it is (i) essentially duplicative of the merger analysis already conducted by the Department of Justice, (ii) excessively time-consuming since this agency waits until after DOJ clearance has been granted before proceeding, and (iii) too speculative in its analysis of who may be potential competitors.

Cumbersome Review Process

We have before us today the merger of two nimble and aggressive firms: WorldCom and MCI. They, and many other firms, operate in many markets, some domestic and some distinctly international. They serve many consumers in the United States and around the world.

Many regulatory authorities, both in the United States at the state and federal level, and in other countries, have already approved the merger with various qualifications. The FCC is the final among countless agencies to offer an opinion. I concur in the decision of this Commission to approve the merger. I concur, however, with deep reservations about the process that these companies have had to endure and about the process that has led to decisions directly affecting American consumers but without recourse to American consumers or American voters.

In part, I am troubled that this agency has taken as long as it has to review this merger, for which we received our first petition for review on October 1, 1997, and which was approved by the Justice Department on July 15, 1998. Surely, future mergers will be handled more expeditiously.[1]

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[1] Indeed, I am deeply troubled that other mergers appear to be taking longer to review once they clear Department of Justice. For example, the merger application for SBC

Our staff has invested substantial talent and resources in the review of this merger, as is evident by the accompanying Order. But our staff is hard working and has many demands placed on their time. Another agency of the federal government, one with specific statutory authority to review mergers and with substantially more staff that specialize in nothing other than merger analysis, has already examined this merger in all market contexts in great detail and has found it acceptable. The heroic efforts of our staff notwithstanding, we have little to add or to subtract from the market analyses or the judgment of this other federal agency but a more detailed public record.

For this reason, I would prefer a more thorough consideration of ways to eliminate the duplicative nature of this dual analysis of proposed mergers. Surely there is a more efficient and less time-consuming process that could be followed. For example, it is the obligation of this agency to find the transfer of licenses is in the "public interest."[2] A finding by this agency that the transfer of licenses involves merging parties that have in the past and are currently complying with existing Commission rules, and that no extraordinary reason to oppose the transfer of licenses is articulated by the public, would seem the proper basis for this agency to exercise its responsibility.

But instead, the Commission has undertaken a wide-ranging analysis of the merger that exceeds even DOJ's principles and that examines broader social issues beyond this agency's expertise or authority. For example, under the precluded competitor framework used in part here, our analysis of potential competitors is too speculative, as we do not require the same type of evidence that the Department of Justice's merger guidelines require of intent to enter the market. Even with our expertise in telecommunications, I question whether we can make such assumptions and whether they are even relevant to a narrow public interest analysis. In addition, I am not convinced that a review of applications to transfer licenses as part of a merger analysis is an appropriate forum in which to assess or craft commitments for broader social policy questions. Is there any limit on the additional benefits that the

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Communications Inc. and Southern New England Telephone ("SNET") -- a smaller transfer and one that appears to raise fewer legal issues -- was filed on February 20, 1998 and cleared the Department of Justice without condition on February 21, 1998. But, the Commission does not yet have an item before it. I fear that the Commission's internal procedures that typically limit Commissioners' input until after an item has been fully drafted and presented is not only precluding full consideration of important issues by the entire Commission in a timely manner, but ultimately delaying the decision-making process. I look forward to working with my colleagues to attempt to rectify this situation.

[2] I emphasize that it is the obligation of this agency to find only the transfer of licenses is in the public interest, not the merger or acquisition of the underlying firms.

Commission could examine or requirements it could impose in determining whether a transfer of licenses is in the public interest?

Conditional Approval

Even if this Commission had stayed narrowly to its statutory authority, however, I would still be troubled by the process outside of this agency that these merging firms have had to endure. I have no reason to doubt that this transfer of licenses falls squarely within any reasonable definition of the "public interest."[3] But I have substantial reason to doubt that the entire process of merger review -- in which this agency is rightly only a small appendix -- is within any reasonable definition of the "public interest."

I fear that the cumbersome nature of this process, and the opportunities for an agency in one country to demand compliance with rules outside of its territorial jurisdiction, pose a threat to international commerce, to firms such as WorldCom and MCI that engage in international commerce, and to American consumers.

I do not have a specific solution to propose to this problem. This agency, by itself, can do little to affect the overall merger process around the world. This agency can, however, voice its concerns. We can state forthrightly that interference in international commerce generally, and international telecommunications in particular, will not be sanctioned by the United States. Enterprises that wish to engage in international commerce need not fear that one nation can dictate the terms and conditions under which that enterprise does business in any other country.

This Commission conditions approval of the merger on MCI's divestiture of Internet assets within the United States. I am not convinced that this divestiture is either economically or legally necessary. Entry and exit in various segments of the Internet business do not appear to have substantial barriers. Indeed, the market structure changes rapidly with countless entities vying in different segments. Were ours a truly independent review, I would emphatically oppose conditioning the merger on divestiture, even if I believed that this Commission can properly consider market structure in the review of the transfer of licenses.

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[3] The Commission has some limited shared Clayton Act jurisdiction, but that jurisdiction does not involve a "public interest" standard. The standard there is quite specific: "substantially to lessen competition, or tend to create a monopoly," 15 U.S.C. Section 18, and does not require that a proposed merger be demonstrably "pro-competitive." The Commission makes no specific findings with respect to this standard. Moreover, another federal agency, with substantially more expertise, has already applied that standard.

But this agency cannot make any pretense of conducting a truly independent review of the newly constituted MCI and WorldCom. The EU has effectively required divestiture of MCI Internet assets in the United States. We, at the FCC, have at best rationalized a decision already made by others.

The Importance of Open Markets to America

I was privileged soon after joining the Commission to have an opportunity to vote for rules that would implement the World Trade Organization's (WTO's) agreement to open telecommunications markets in all nations, including the United States, to carriers from any nation. It was a proud moment. Open markets are good for consumers, particularly American consumers. Open markets are good for businesses, particularly the many competitive American businesses that seek to compete around the world.

More fundamentally, however, open markets are important for the fulfillment of American ideals. In America, the government serves the individual, and not visa versa. Whether in individual or business conduct, freedom from excessive regulation has long been important to Americans. It was, indeed, the efforts of a distant government to restrict commerce within America, and international commerce with America, that ignited the American revolution.

The importance of free international commerce has waxed and waned in American history, but in every generation, the United States has taken principled positions to preserve open international commerce. Even as a young and relatively powerless nation, the United States stood for open international commerce. It negotiated treaties with European powers to secure access to commerce in the Mississippi Valley. Restrictions on American commerce on the high seas led to hostilities with England and France. It was the weak and distant United States, not the nearby and powerful European nations, that refused to pay tribute to the Barbary pirates. The federal government of the United States two hundred years ago was, by contemporary standards, extraordinarily weak. It was small, had few assets other than land, regulated little, and taxed perhaps even less. There was little of a standing army or navy. But that government lacked nothing of determination in protecting the young nation's sovereignty. It would not tolerate threats to its sovereignty on the high seas, much less at home.

The Importance of Jurisdictional Boundaries to International Commerce

Open international commerce does not mean that businesses are immune from national or local laws in areas of appropriate jurisdiction or treaty obligations. Those laws, and regulations under them, to the extent they do not obstruct commerce, actually enhance

international commerce by providing a clear and predictable legal framework for commercial activities.

Jurisdictional boundaries, however, must be respected for international commerce to be truly open. A nation may reasonably regulate the business activities of a firm within its borders as a condition of operating within that country, but a nation may not reasonably restrict business activities in a third country. Nations do coordinate, harmonize and even reciprocate regulatory treatment of businesses, but only through duly authorized agreements or treaties.

If every one of the nearly two hundred countries in the world sought to require international firms to abide by its regulations not merely within its national boundaries, but in other countries as well, international businesses and international commerce would cease to exist as we know them. Indeed, if even one country sought to compel businesses to conform to its regulations, international commerce would cease to be open.

MCI, the EU, and Duress

To secure approval for its merger with WorldCom from EU regulatory authorities, MCI was forced to make concessions on its assets not merely in countries under EU jurisdiction but in the United States as well. In particular, MCI was required to divest itself of much of its internet business activities in the United States, including retail household services.

Some will say that MCI, a private party, agreed to these conditions, and thus there is no reason for government concern. These concessions, however, were made under duress, concessions that MCI would not willingly have made to another private party, or even to many governmental entities.

Which Merger is the FCC Reviewing?

The matter before this Commission is ostensibly the transfer of licenses between WorldCom and MCI based on a petition filed on October 1, 1997.[4] That petition was made before the EU review and demands. What is before this Commission today is the transfer of

[4] Following WorldCom and MCI's November 9, 1997 merger agreement, the companies jointly filed an amended application for transfer of control of MCI's licenses and authorizations to WorldCom on November 21, 1997. On July 31, 1998, Applicants filed a minor amendment listing additional private land mobile radio licenses held by MCI, but not included in the initial application.

licenses between substantially altered entities in large part as the result of requirements on U.S. assets imposed by the EU. The option to review the transfer of licenses between the originally proposed parties is today largely an academic exercise. Even if this Commission were to approve the transfer of licenses between the original unaltered entities, the future of those entities has been irretrievably altered by the EU decision.

In this Order today, we go through the motions of that academic review of the merger of two firms one of which today cannot be sustained in the future. We reach the fortuitous conclusion that all is well if the EU prescription of divestiture is followed. It is a fortuitous conclusion because what would the practical effect have been had the Commission reached the opposite conclusion such as the following: the public interest would be served in the transfer of licenses if MCI does not divest itself of its internet assets but instead WorldCom should divest itself of its assets? Or what would the result have been if the public interest would best be served if neither company divested anything? Indeed, the FCC has been urging that companies like MCI provide advanced services to the retail consumer markets. What if the Commission had concluded that by forcing the merged company to divest the largest piece of their internet backbone, the Commission only hinders the possibility that residential costumers will indeed see the benefits of such advanced services?

The simple answer to these questions is that the Commission analysis can do little more than rubber stamp those decisions already made by the EU unless we should find that further forms of divestiture, forfeiture, or regulatory punishment are warranted. As I have indicated above, I am troubled that the Commission engages in extensive market analysis and the development of conclusions about market structure and performance and remedies for the illegal use of market power that duplicate work done by other federal agencies. I am even more troubled that we should make these analyses when they can do little more than rubber stamp decisions made by foreign regulatory entities.

Timing and Jurisdiction

In a world of competing jurisdictions over mergers among various international, national, state, and local authorities, agencies that review the merger first -- and impose conditions first -- may have disproportionate effects on the final structure of the multiple reviews. The first judgments can be modified but not fully overturned. In a world of competing jurisdictions, this review process may create incentives for some agencies to attempt to move first to the disadvantage of agencies that move subsequently. The race to review first, however, would largely evaporate if agencies agreed on jurisdictional responsibilities such that there were little if any overlapping jurisdiction.

EU as Close Friends of the United States

The EU consists of some of the United States closest allies and best friends in the world. It is difficult to imagine that the EU would have required MCI divestiture within the United States had there been the slightest likelihood of dissatisfaction from the United States. To exercise jurisdiction where it is tacitly allowed is not a hostile or unwelcome act. The EU should not be blamed for acting where it is allowed. Had the United States simply signalled that we can apply our own laws to assets in the United States, this problem would not have developed.

As I noted upon passage of the WTO implementation rules, in international commerce the United States must lead by example. We must have the most open and freest market in the world. We must champion the cause of consumers and businesses, both in this country and around the world, who seek better lives and more technological advances through competition and free markets. And we must find better and more expeditious ways to review international mergers.

September 14, 1998

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL K. POWELL

Re: *Memorandum Opinion and Order, Application of WorldCom, Inc. and MCI Telecommunications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (CC Docket No. 97-211).*

I am pleased the Commission is able to conclude its obligations in this matter by allowing MCI and WorldCom to do what they have been so eager to do for so many months: join forces to bring more of the benefits of competition to themselves and to the American consumer.

This *Order* is the culmination of an enormous amount of work by our dedicated and talented staff. I applaud the staff for their efforts to bring this highly complex proceeding to closure. I sincerely hope, moreover, that the framework we have erected here will serve as a useful template to help expedite future merger review proceedings. We must strive constantly to make the review process more efficient and thereby better keep pace with market developments.

Of course, as a proponent of vigorous antitrust enforcement, I would not celebrate the prospect of the union of MCI and WorldCom were I not confident (as much as our predictive tools allow) that the merger will not aggravate the potential for anti-competitive conduct. As the *Order* thoroughly documents, however, the likelihood that the proposed merger will result in such aggravation is minimal. I take particular solace in the fact that, with this *Order*, the Commission joins the ranks of several state, federal and international regulatory bodies, all of which have seen fit to approve this transaction.

In this statement, I explain the bases upon which I support this *Order*. Specifically, I believe this *Order* appropriately: (1) declines to give significant weight to considerations that fall outside our core function of setting telecommunications policy and the unique expertise deriving from that function; (2) expresses some willingness not to "re-invent the wheel" with respect to competitive analysis of mergers already reviewed by the Department of Justice; and (3) does not impose additional, unnecessary conditions on the merger.

Disciplining the Public Interest Standard

The primary reason I support adoption of this *Order* is that much of the analysis is consistent (or at least not *in*consistent) with my views regarding the considerations that should discipline our pursuit of "the public interest." On several occasions in the broadcast context, I

have expressed my discomfort with the "penumbral bounds" of the public interest standard.[1] I consequently have tried to develop basic principles that I believe should guide our exercise of this wide discretion.[2] I believe it may prove useful for the Commission to outline such principles in applying the public interest standard for purposes of telecommunications mergers, adjudication and regulation. Only by looking to such principles can the Commission, in my view, reach conclusions that are relatively predictable, reasoned applications of the public interest standard and not just the result of the most effective lobbying or political pressure, or our unguided subjective judgment. In this statement, I begin to sketch the principles I believe should apply in the telecommunications merger context. I also explain how this *Order* comports with these principles.

Fundamentally, I believe that the Commission's public interest authority to review transfers of authorization is not a license to sweep into the review every possible goal that one could argue is supported by or consistent with the statute. Nor should we allow our public interest authority to degenerate -- in reality or impression -- into serving as a "back door" to achieve results the Commission is unable (or unwilling) to accomplish more directly, through traditional rulemaking. Rather, I believe our public interest authority to review transfers of authorizations evidences Congress' recognition that it could not foresee every possible set of facts that might so endanger the pro-competitive, deregulatory framework of the statute that such facts warrant denial of the transfer. Congress gave this broad authority to an expert agency, the Commission, so it could use that expertise to take into consideration facts that Congress could not concretely anticipate.

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[1] *See, e.g.*, FCC Commissioner Michael K. Powell, " The Public Interest Standard: A New Regulator's Search for Enlightenment," Speech Before the American Bar Association 17th Annual Legal Forum on Communications Law (April 5, 1998); FCC Commissioner Michael K. Powell, "Willful Denial and First Amendment Jurisprudence," Remarks Before the Media Institute (April 22, 1998). Justice Felix Frankfurter said that the "vagueish penumbral bounds expressed by the standard of the public interest" "[leave] wide discretion and [call] for imaginative interpretation." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90, 91 (1953). My effort to develop principles for exercising our public interest discretion is an effort to ensure that this discretion is bounded by more than the Commission's collective imagination.

[2] My decisional schematic for broadcast poses five basic questions:
(1) does the Commission have the authority to do what is asked?;
(2) if we have the authority, is it nonetheless better to leave the matter to Congress or await more specific instruction from Congress;
(3) is the issue better addressed by a state or another federal agency;
(4) if the Commission has authority and is the arm of the government best suited to act, should we?; and,
(5) would any action we take be Constitutional?
FCC Commissioner Michael K. Powell, " The Public Interest Standard: A New Regulator's Search for Enlightenment," Speech Before the American Bar Association 17th Annual Legal Forum on Communications Law (April 5, 1998).

Based on this fundamental belief, I submit that the decision whether to attribute significant (or any) weight to a particular factor in our public interest merger review should turn on whether:

> (1) the Commission has *authority* even to consider that factor;
> (2) the action the Commission would take with respect to that factor is part of our *core function* of setting telecommunications policy; and
> (3) the action relies on our *unique expertise* in setting such policy and is not more readily handled by other processes or other institutions vested with Congressional authority.

Let me elaborate on these three principles.

Most obviously, the Commission should not be taking any action that Congress did not delegate it *authority* to take. Conversely, the Commission should not take action that would violate any statute or the Constitution. But given the breadth of the public interest standard itself, answering the authority question may provide clear guidance only in those extreme circumstances in which consideration of the factor would contravene the letter or spirit of some statutory or constitutional provision.

The Commission also should not place significant weight on considerations that do not fall within our *core function* of setting telecommunications policy. Does consideration of a particular factor center on the manner in which firms provide services to end users or to other service providers? Does consideration of the factor involve communications rate-or standard-setting or involve laying the ground rules for competition? Does the factor implicate areas of private conduct that the Commission consistently regulates in the context of telecommunications? If the answer to these and similar questions is "no," I would strongly favor attaching little, if any, weight to that factor in our merger analysis.

Perhaps most important in disciplining our public interest merger analysis is deciding whether consideration of a particular factor relies on our *unique expertise*. Telecommunications affects our lives in countless ways. Thus, it is no surprise that telecommunications may play some part in a wide variety of social issues. Simply because we regulate the provision of telecommunications, however, does not mean that we are experts on all of these issues. Thus, we should be hesitant to give issues with which we have no special talent a prominent place in our merger analysis, even though there may be strong moral and political motivations for doing so.

Instead, I firmly believe the Commission should work to focus its public interest merger analysis on considerations that leverage our unique expertise. We should constantly ask ourselves whether some other agency has roughly equivalent or even superior expertise and authority to address any given factor, either in reviewing the merger at issue or in some other context. In my view, moreover, where another agency has specific statutory jurisdiction

to address a particular factor, we should seriously consider the propriety of exercising our broad public interest discretion.

The Commission's credibility -- and thus its influence -- in Congress, the courts and elsewhere in our federal system depends in large measure on the extent to which we act within our jurisdiction and do not stray from the confines of our unique, core expertise. The Supreme Court has in principle supported this idea in stating that "reviewing courts do not owe deference to an agency's interpretation of statutes outside its particular expertise and special charge to administer."[3] Simply put, we cannot command respect as an "expert agency" if our pronouncements turn on subjects in which we are not expert or which do not rely on our unique capabilities. Likewise, the soundness and clarity of our analysis will suffer if we try to fold into our merger analysis every possible regulatory goal that strikes our fancy or that might be inferred from provisions of the statute. Thus, I am particularly pleased that this *Order* does not weigh too heavily considerations that are inherently speculative and that bear at best a tenuous relationship to the underlying motives and direct consequences of the proposed merger.

I would apply the three guiding principles I have articulated -- authority, core function and unique expertise -- to the types of considerations in this *Order* as follows:

With respect to allegations of intentional discrimination, I believe there may be a plausible argument that the Commission's consideration of some discrimination concerns falls within our core function of setting telecommunications policy and the unique expertise that derives from that function. In particular, I believe there may be merit in attaching some weight to discrimination concerns in our merger review when such discrimination contravenes carriers' universal service obligations or the traditional duty of common carriers to treat all customers equally. Section 201 of the statute, for example, mandates that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor."[4] To the extent allegations of racial and other forms of discrimination amount to violations of that duty, there may be an argument that such alleged violations should be given weight in our merger analysis. I would be open to considering this and other such arguments that focus on the Commission's core function and unique expertise in setting communications policy.

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[3] *Ardestani v. Immigration and Naturalization Service*, 502 U.S. 129, 148 (1991) (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990)). *See also Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 ("In making a public interest judgment under the Communications Act, the Commission is exercising both its congressionally-delegated power and its expertise; it clearly enjoys broad deference on issues of both fact and policy."). (D.C. Cir. 1989). The courts' statements appear to acknowledge that, in deciding what degree of deference should be given an agency action, judges will not find it irrelevant that the action does not fall within the agency's core expertise.

[4] 47 U.S.C. § 201(a).

Other discrimination and disparate treatment concerns, such as employment diversity and minority representation -- however sympathetic or onerous to the republic -- generally fall neither within the Commission's core function of setting telecommunications policy, nor within the Commission's unique expertise in setting such policy. Thus, I believe the Commission should leave these latter concerns primarily to the courts and other agencies (*e.g.*, the Department of Justice, Equal Employment Opportunity Commission).[5] In those limited circumstances in which these concerns might fall within our core function and unique expertise, the Commission should not address these concerns in an *ad hoc* way, pursuant to its obligation to ensure that transfers of certain types of authorizations are consistent with the public interest. Instead, the Commission should pursue such goals in the context of a rulemaking.[6] This approach would at least make it more likely that all of the parties interested in the topic participate in the proceeding. Parties that might be concerned about how the Commission will police discriminatory conduct may not think to comment on a particular merger, whereas they may take notice of a general rulemaking on discrimination.

With respect to some of the labor-related concerns raised on the record, I would submit that allegations that employment levels will be adversely affected by a given merger should be afforded little, if any, weight in the Commission's merger analysis. Even if we believe we have jurisdiction to consider this factor as part of our merger review, it lies outside our core function of setting communications policy and the unique expertise deriving from that function. Indeed, I believe employment levels are more directly an issue for collective bargaining and the well-established body of labor law. Furthermore, parties who wish to obtain relief regarding employment levels may seek such relief in the courts and before other government entities like the National Labor Relations Board.

I fully recognize that the federal government may play an important role in pursuing some of the social or other goals raised by the commenters that fall outside the rubric of traditional competitive analysis. For example, I firmly believe that the federal government, viewed as a whole, must be vigilant to prevent intentional racial discrimination to the extent the Constitution allows. I also believe the government may play a useful role in devising incentives consistent with market principles that enhance minority participation in the communications sector (*e.g.*, minority tax certificates in the broadcast context).

But just because it may be appropriate for *some* part of the federal government to pursue particular social goals does not mean that the *Federal Communications Commission* must apply the balm for all that ails us; that would be like playing doctor without a license or

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[5] I express no opinion here regarding equal employment opportunity concerns in the broadcast context, which may present unique circumstances that I do not address in this statement.

[6] For example, if one can demonstrate a history of intentional racial discrimination, remedies for which fall within our core function and the unique expertise deriving from that function, it may be appropriate for the Commission to conduct a rulemaking to put in place remedial policies, consistent with the law. *See generally City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

adequate training. Congress has seen fit to give primary responsibility for overseeing such areas as labor relations and anti-discrimination efforts to other agencies. At best, duplicating such oversight at the Commission may strain precious resources and encourage parties to "forum shop" among various agencies in attempt to obtain desired outcomes.

I support this *Order,* in part, because it does not afford significant weight to considerations such as employment levels and job discrimination that I believe should not figure prominently in our telecommunications merger analysis. As such, I believe the *Order* evidences at least some reluctance by the Commission to let the scope of our merger analysis sweep too broadly.

Avoiding Re-inventing the Wheel

I also support this *Order* because the analysis leaves open the possibility that the Commission may take into consideration actions taken (or not taken) by the Department of Justice with respect to a proposed merger. This position derives, in part, from my belief that the Commission should focus its public interest merger analysis on factors relating to its unique expertise.

In my view, there is potential in the future for the Commission to devise ways -- formal or informal -- to take into consideration how the Department deals with a particular merger in our own merger analysis. I believe this potential exists even where the Commission performs an independent analysis or the method and scope of our analysis differ from that employed by the Department. As our reliance on the Department's horizontal merger guidelines demonstrates, there may at times be significant overlap between the analytical frameworks employed by the Commission and the Department. To suggest otherwise would strain credulity. Based on my acknowledgment of this analytical overlap, and my deep respect for the diligence and considerable expertise of the Department, I am hopeful that the Commission will, in the future, be able to minimize duplications of effort in the area of competitive analysis and thereby use our regulatory resources most efficiently.

Declining to Impose Unnecessary Conditions

Finally, I support the result here because it evidences at least some reluctance to impose additional, unnecessary conditions on mergers. I believe the Commission must be extremely circumspect about imposing conditions or extracting commitments from the applicants to do things that fall well outside their legal obligations under the statute. New entrants into the local exchange market, for example, are not obligated under the statute to serve every type of customer, no matter how desirable that result might be. Thus, I would seriously question imposing such a requirement on new entrants through the merger review process.

Moreover, just as I believe the Commission should not let its public interest analysis sweep too broadly, I firmly believe that if we begin to impose merger conditions too easily or

make those conditions too excessive, we will injure the Commission's credibility and influence. We also may thereby substitute regulators' judgments about how communications resources should be allocated for the judgments of consumers and competitors in the marketplace.

In my view, this *Order* is consistent with these beliefs. I would point out that, other than with respect to the divestiture of Internet assets prompted by the Justice Department and European Commission, we have imposed no significant conditions on this merger.[7] Rather, the *Order* merely evidences expectations that MCI and WorldCom have honestly represented their intentions to conduct their activities in the manner they have stated on the record (*e.g.*, their representations regarding the types of customers they will serve). As such, I believe the "mere expectations" expressed in the *Order* amount primarily to reminders that parties should not lie or misrepresent their intentions to the Commission.

In conclusion, I should note that I would be especially reluctant to try to punish former applicants if, as they begin to carry out their stated intentions, they find they must divert from their commitments in merger applications for business reasons or legitimate concerns regarding the regulatory environment. Moreover, I would vigorously oppose any efforts by the Commission, formally or informally, to require applicants to submit commitments regarding how the merged entity will conduct its business. Again, the Commission will work harm to its credibility and, I believe, the public interest if it is perceived to be attempting to achieve aims through such "voluntary" commitments that the Commission is unable or unwilling to achieve through more direct means.

For the foregoing reasons, I am pleased to support approval of the proposed merger. I commend the Commission staff for its hard work in this proceeding, and I look forward to working together with everyone at the Commission as we review future proposed transactions.

[7] Note, however, that the transfer of MCI's direct broadcast satellite (DBS) license to WorldCom is subject to the outcome of pending applications for review of the initial license grant to MCI.

September 14, 1998

Separate Statement of Commissioner Gloria Tristani, Dissenting in Part

Re: *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communication Corporation to WorldCom, Inc., CC Docket No. 97-211.*

I write separately and dissent in part from the majority's decision not to impose some type of reporting requirement to monitor the merged company's progress in the local residential market.

The Commission's framework for evaluating mergers is simply that a merger should be approved if its positive effects outweigh its negative effects. One significant negative consequence that was alleged was that the merged company would abandon the possibility of competing for residential customers in the local market. The Order ultimately does not weigh this possibility against that application, in large part because of a commitment by WorldCom and MCI to compete in the local residential market. I place great importance not only on the ability of the merged company to compete, but the likelihood of that it will do so.

After expressing its reliance on the commitment by WorldCom and MCI, the majority notes that it will monitor the merged company's progress in the local residential market. I applaud and fully support their willingness to monitor the company's actions following the merger. However, I respectfully disagree with their decision not to impose some type of reporting requirement on the merged company that would facilitate such monitoring. A minimal reporting requirement seems to me an eminently reasonable way of seeing whether the company follows through on its commitment to compete for residential customers for local service. If the company intends to keep its commitment, what's the harm in keeping us apprised of its progress?

While I recognize, as the majority does, that the Commission has gathered some information about the status of competition in the telecommunications markets, the process is not regularized or particularly useful in providing information about the progress of local competition generally or local residential competition in particular. My preoccupation with getting these facts is based on this Commission's obligation to gauge the progress of competition as we implement the Communications Act's pro-competitive provisions.

It is my hope that at some future date, the Commission will create a meaningful mechanism for measuring the progress of local competition that would obviate the need for a reporting requirement here. At this point, however, I am unwilling to rely on a future mechanism for gathering such information when such mechanism's very existence and

suitability for the purposes at hand are uncertain. Additionally, it cannot be reasonably argued that a reporting requirement consisting of a one-page letter every six months is overly burdensome. It is also worth noting that at least two state commissions (Missouri and Georgia) require all local carriers to report regularly on the number of residential lines they serve simply as a condition of providing service in those states. Thus I would think it quite sensible for this Commission to direct the merged company to keep us apprised of its compliance with a commitment that, judging from paragraphs 192-193, was clearly critical to our approval of this merger.

I would underscore my expectation that WorldCom-MCI live up to its commitment to compete for local residential customers, the vast majority of whom continue to have exactly one choice for local telephone service today. And I take this opportunity to make clear that I will take a great interest in seeing that the company adhere to this commitment.

Finally, I take this opportunity to address one issue in Commissioner Powell's separate statement accompanying this Order. I do not share his hesitation to explore, in the context of a merger, allegations that one or both of the applicants has declined to serve customers on the basis of the customers' race. Such allegations were made in this proceeding against the applicants. My colleagues and I ultimately determined that those claims were not actionable because: (1) the applicants sufficiently explained how their networks came to be laid out in this fashion; and (2) the parties seeking to halt the merger on these grounds provided no other evidence of the merged company's intent to discriminate on the basis of race. Nonetheless, I would underscore that I will always be concerned with allegations of racial discrimination in determining whether proposed telecommunications mergers serve the public interest.

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